No. 11773.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

vs.

WILLIAM K. CARSON,

Appellee.

APPELLANT'S REPLY BRIEF.

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For the sake of consistency the Appellee will be designated as plaintiff and the Appellant as defendant throughout this reply brief.

Appellee's "A."

In defendant's opening brief the error of the Trial Court in failing to hold as a matter of law that a brake club was not a part of the hand brake within the meaning of the Safety Appliance Act was presented for consideration of this Court: The further error of the Trial Court in permitting the jury to speculate as to the applicability of the Safety Appliance Act under the facts of this case was set forth as additional grounds requiring reversal of the judgment entered herein.

A consideration of plaintiff's reply to these specifications of error fails to disclose any satisfactory legal basis for the Trial Court's action.

In support of plaintiff's contention that the brake club was a necessary part of the hand brake within the meaning of the Safety Appliance Act, plaintiff cites the cases of *Edgington v. Southern Pacific Company*, 12 Cal. App. (2d) 200, and *Lilly v. Grand Trunk Western Railway Company*, 317 U. S. 481, 87 L. Ed. 411, which cases construe provisions of the Federal Boiler Inspection Act, Title 45, Chapter 1, Section 23.

It is the position of defendant that cases construing the Boiler Inspection Act are in no way determinative of the questions presented here in view of the express provisions of that Act itself as distinguished from the Safety Appliance Act, which plaintiff contends is applicable to this case.

The Boiler Inspection Act provides as follows:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all *parts and appurtenances thereof* are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carier without unnecessary peril to life or limb, * * *." (Emphasis added.)

Section 11 of the Safety Appliance Act provides in part as follows:

> "It shall be unlawful for any common carrier subject to the provisions of sections 1-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in sections 11-16 of this title, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; * * *."

It is readily apparent that the Boiler Inspection Act itself makes provision whereby "parts and appurtenances" not expressly mentioned therein may be construed as coming within the purview of the Act. There is no requirement of Section 11 that all "parts and appurtenances" of a car shall be included within its provisions, but only that each car shall be equipped with certain standardized appliances including efficient hand brakes.

The cases cited by plaintiff construe the provisions of the Boiler Inspection Act, which as noted above expressly includes "parts and appurtenances" of a locomotive, its boiler and tender. Plaintiff has not cited a single decision wherein the provisions of the Safety Appliance Act have been enlarged upon to include any equipment not expressly enumerated in the Act itself. This fact bears out defendant's contention that the provisions of the Safety Appliance Act itself leave no room for the courts to enlarge thereon by including in addition to the appliances expressly mentioned any additional equipment, since that Act does not contain the words "parts and appurtenances," and expressly enumerates the equipment covered by its provisions.

Argument similar to that made by plaintiff herein was made in *Atchison, Topeka & Santa Fe Railway Company v. Scarlett*, 300 U. S. 471, 81 L. Ed. 479, cited in Appellant's Opening Brief, page 41, wherein an effort was made to enlarge upon the express provisions of the Safety Appliance Act, and wherein the Court held that the Act was not subject to such construction.

Appellee's "B."

Under point "B" of Appellee's brief, in an effort to justify the giving of a prejudicially erroneous instruction, counsel resort to the customary brief writing technique of saying that even though the instructions complained of may have been erroneous they were not prejudicial. In support of this proposition the *Edgington* case is cited to the effect that a general verdict may be supported where there is evidence showing a violation of at least one of several statutes under which the action is brought.

The principal of law announced in the *Edgington* decision is clear and undeniably sound when applied to the facts set forth therein. In that case there was evidence offered from which the jury could properly conclude that there was a violation of either the Federal Safety Appliance Act, the Federal Boiler Inspection Act, or the Federal Employers' Liability Act and there was no question of law as to the applicability of any of these statutes. Special verdicts of the jury indicated that it found there was no violation of the Safety Appliance Act, but that there was a violation of the Boiler Inspection Act. There was also evidence to support a finding that plaintiff's injury was the result of a violation of the Federal Employer's Liability Act, and hence the verdict of the jury was upheld.

In the case it bar it is contended that the Safety Appliance Act had no application as a matter of law and that there was no evidence to justify a verdict based thereon. There being no special verdict in the instant case whereby this court can say that the jury did not find for plaintiff based on a violation of the Safety Appliance Act, the rule of the *Edgington* case falls and this action is thus governed by the general rule that where two is-

sues of negligence are submitted to the jury a general verdict must fail unless there is evidence in support of both issues.

In *Christian v. Boston & M. R. R.,* 109 F. (2d) 103, 1940, an action was brought under the Federal Employers' Liability Act alleging two separate charges of negligence both of which were submitted to the jury over defendant's objection. The Circuit Court concluded there was no evidence to support the second charge although there was evidence justifying the submission of the first charge. In reversing a verdict rendered on behalf of plaintiff the Court said on page 105:

> "The error requires reversal of the judgment. The verdict for the plaintiff was a general one. For all we know, the jury found its verdict on the claim for which there was no evidence. Where two issues of negligence are sent to the jury and the verdict for the plaintiff is general, the judgment must be reversed if there was no evidence in support of one of the issues. Wilmington Star Mining Co. v. Fulton, 205 U. S. 60, 27 S. Ct. 412, 51 L. Ed. 708; New York, N. H. & H. R. Co. v. Murphy, 2 Cir., 204 F. 420; Erie R. Co. v. Gallagher, 2 Cir., 255 F. 814."

In *Schilling v. Delaware & H. R. Corporation,* 114 F. (2d) 69, 1940, likewise brought under the Employers' Liability Act, the Circuit Court reversed a verdict for the plaintiff saying on page 72:

> "As the case must be treated now as submitted upon the unproved issues of failure to warn the plaintiff of the impending movement of the car, and lack of time to cross the track as well as upon theories of recovery as to which submission was justified there must be a reversal since the verdict was

general and no one can tell whether or not the jury found for the plaintiff upon an issue unsupported by the evidence. Christian v. Boston & Maine R. R., 2 Cir., 109 F. 2d 103."

It follows from the foregoing that since the jury may well have found against defendant by an erroneous application of the Federal Safety Appliance Act the prejudicial error in submitting this question as a matter of fact under the instructions complained of becomes readily apparent.

Appellee's "C."

Under this point plaintiff argues that there was evidence in this record to justify the conclusion that defendant failed to use reasonable care in the furnishing of this brake club to its employee.

It is felt by defendant that this argument loses sight of the fact that in situations of this type the employer is not an insurer and that there are certain fundamental practical limitations involved in the locating of latent defects in instruments of this character. The practical aspects of this problem have been recognized by the Supreme Court of this state in the case of *Honea v. City Dairy, Inc.*, 22 Cal. (2d) 614, 1943, wherein plaintiff sued for personal injuries when a glass milk bottle "just broke" in her hand. It was therein claimed that defendant was negligent in failing to discover the defect in the bottle. In reversing a judgment rendered in favor of plaintiff the Court held that even though defendant had a duty of inspecting both old and new bottles it was not responsible for defects that could not be found by a *reasonable* and *practicable* inspection. The Court in render-

ing its decision quotes from the Supreme Court of Kentucky as follows:

> " 'Unless we were prepared to hold defendant as an insurer, it is hard to see how else it could be held responsible without some showing that its opportunity to exercise care was in some measure proportionate to the duty imposed—without some showing that a more thorough inspection would have been effective. Plaintiff's experts suggest various methods of testing bottles which might be applied, but it is not shown that these tests are commercially practicable or that they would have disclosed the complained-of defect * * *. We must measure the duty by ordinary standards and by consequences reasonably to be anticipated. Subject to these criteria, it is clear that the proof falls short of raising any inference of negligence.' "

This decision recognizes the practical limitations upon the discovery of defects and denies recovery even though it may be theoretically possible to invoke further tests.

As pointed out in pages 52-56 of defendant's opening brief the brake club in question was purchased from a reputable manufacturer whose clubs were subjected to rigorous tests and specifications before being supplied to the railroad brakemen. The particular club in question, as selected by plaintiff, appeared "like new" and was without apparent defect. This club was used by plaintiff, without mishap, some 30-35 times before it broke and was obviously unavailable to defendant for further inspection during this time. Despite the foregoing, plaintiff requests this Court to, disregarding the practical aspects of the problem, permit the jury to infer negligence because the club broke in two and because William D. Jacobs said it appeared to him to be "too light."

Defendant earnestly contends that for this Court to permit the jury to infer negligence from the testimony in this case would be to sanction a verdict based upon speculation and without foundation in fact contrary to our cherished and fundamental legal concepts.

Conclusion.

It is respectfully submitted that for the reasons herein stated plaintiff has failed in his attempt to answer the assignments of error presented in defendant's opening brief and that for the reasons set forth therein the judgment entered in this case should be reversed and set aside.

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